

The Secretary
Standing Committee on Administration and Procedure
Legislative Assembly for the Australian Capital Territory
Civic Square, London Circuit
CANBERRA ACT 2601

Inquiry into the appropriate mechanisms to coordinate and evaluate the implementation of the Latimer House Principles in the governance of the ACT

Thank you for the invitation to make a submission to this inquiry.

The ACT Electoral Commission's submission is attached.

If you would like further information, I can be contacted at elections@act.gov.au or on 6205 0033.

I would also be available to give evidence at a public hearing if desired.



Phillip Green
Electoral Commissioner

27 May 2009

**Submission by the ACT Electoral Commission
to the Standing Committee on Administration and Procedure**

Inquiry into the appropriate mechanisms to coordinate and evaluate the implementation of the Latimer House Principles in the governance of the ACT

Introduction

This submission is provided to the Standing Committee on Administration and Procedure in response to its Inquiry into the appropriate mechanisms to coordinate and evaluate the implementation of the Latimer House Principles in the governance of the ACT. The submission addresses the issues listed in the Committee's terms of reference for this inquiry.

The following discussion is based on the Commission's understanding of the relevant legal provisions. The Committee may wish to seek formal legal advice on these issues.

The Latimer House Principles

The Latimer House Principles aim to provide an effective framework for the implementation by governments, parliaments and judiciaries of fundamental values related to the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.

The role of electoral commissions in good governance

Latimer House Principle (i) *Oversight of Government* indicates that the full participation of citizens in the democratic process is a key element in ensuring transparent and accountable government. Implicit in the concept of the democratic process is the notion of free and fair elections.

Latimer House Principle (i) also states that the establishment of scrutiny bodies and mechanisms to oversee government enhances public confidence in the integrity and accountability of government. The Principle states that independent bodies such as public account committees, ombudsmen, human rights commissions, auditors-general and similar institutions play a key role in enhancing public awareness of good governance.

While the Latimer House Principles do not explicitly include electoral commissions in the list of independent oversight bodies, a case can be made for including electoral commissions in the list of independent bodies essential to the health of a democratic governance model.

In their 2003 paper, 'Australian Electoral Law: A Stocktake', Graeme Orr, Bryan Mercurio and George Williams state:

Ultimately, the most important institutional measure in Australia for achieving free, efficient and reliable elections is ensuring electoral authority independence. Elections in Australia are characterized by

*centralized, professional and, by and large, completely independent electoral commissions.*¹

In his 2007 paper, 'Australia's Electoral Management Bodies – Degrees of Independence', Norm Kelly states:

*it is widely accepted that, to ensure free and fair elections, electoral management bodies should be independent of the government of the day and of any political partisan connections.*²

The importance of independent electoral authorities is also recognised internationally:

*Historical evidence, coupled with conclusions by observers and advocacy by electoral professionals, almost unanimously indicates that independent electoral bodies serve democratic stability better than elections run by the executive branch and that permanent EMBs [Election Management Bodies] are more cost-effective than temporary ones.*³

*The status, powers and independence of the election administration and administrators, and the impartiality and transparency with which they act and are seen to be allowed to act, are fundamental to the integrity of an election. The composition, mandate and status of an election management body ... should be clearly defined to ensure its independence and non-partisan character.*⁴

Every Australian federal, State and Territory parliament has recognised the need for independent electoral commissions, with the gradual adoption of statutory electoral commissions beginning with the establishment in 1984 of the first commission, the Australian Electoral Commission, and ending with the creation of the most recent Electoral Commission in South Australia in 2009. The ACT Electoral Commission was created in 1992.

However, while every Australian jurisdiction has an electoral commission, and there is general agreement that electoral commissions should be independent, the degree to which each electoral commission is "independent" varies between the jurisdictions. Paul Dacey from the Australian Electoral Commission has argued that independence is not an absolute, so that an electoral commission is

¹ Graeme Orr, Bryan Mercurio and George Williams (2003) 'Australian Electoral Law: A Stocktake', *Election Law Journal* 2(3), pp 399-400.

² Norm Kelly (2007) 'Australia's Electoral Management Bodies – Degrees of Independence', Paper presented at the 2007 APSA conference, Monash University, p 3.

³ Rafael López-Pintor (2000) *Electoral Management Bodies as Institutions of Governance*, Bureau for Development Policy, United Nations Development Programme, p 12

⁴ Commonwealth Secretariat (1997), *Good Commonwealth Electoral Practice: A Working Document 1997*, p 6.

either independent or not; rather he argues that the extent of independence can fall on a continuum, and that where an electoral commission falls on that continuum will depend on the extent of its institutional independence in a number of different dimensions.⁵

Elements of independence

Latimer House Principle (i) states that independent bodies play a key role in good governance. However, the Principle does not define "independent". Key elements of statutory independence for electoral authorities have been identified by the International Institute for Democracy and Electoral Assistance as:

- Institutional independence from the executive;
- The ability to exercise full responsibility for electoral functions;
- Power to make policy decisions independently under the legal framework;
- Composed of members outside the executive with security of tenure;
- Ownership and management of a budget independent of day-to-day government control that does not fall within the budget of a government ministry;
- Autonomy to determine staffing needs and appointments; and
- Electoral authorities should not be part of a department of state.⁶

Ensuring the independence of the ACT Electoral Commission

On most of these measures, the ACT Electoral Commission is independent of government to a great extent. Throughout its history, from 1992 to the present, the Commission has consistently conducted its affairs with independence and integrity. However, it is arguable that there are further steps that could be taken to strengthen the legislative guarantees of the Commission's independence.

The extent of the Commission's independence is regulated by the legislative framework in the ACT that establishes the Commission, gives it functions, and regulates its operations, including its personnel and finance powers. This legislative framework is discussed below.

⁵ Paul Dacey (2005) 'What do "Impartiality", "Independence" and "Transparency" Mean? – Some Thoughts From Australia'. Improving the Quality of Election Management, Conference of Commonwealth Chief Election Officers, New Delhi, India, p 7.

⁶ International Institute for Democracy and Electoral Assistance (2006) *Handbook on Electoral Management Design*, pp 7-9; ACE Project, "What an Independent Model EMB Is, May Be, and Is Not", <http://aceproject.org/ace-en/topics/em/ema/ema02/ema02a>, accessed on 8 May 2009.

The Electoral Act 1992

The *Electoral Act 1992* establishes both the 3-person Electoral Commission and the separate office of the Electoral Commissioner and the staff appointed to assist the Commissioner. It gives the Commission and the Commissioner a wide range of functions that are not expressed as subject to the direction of a Minister, the executive or a department.

The explicit powers given to the Minister and the Executive under the Electoral Act are very limited and do not impinge on the Commission's independence. They include: the power to request advice of the Commission on specified matters; the power to receive and table Commission reports; the power to appoint Commission Members, determine their terms and conditions of employment and approve their leave; the power to suspend a Member from duty for misbehaviour or physical or mental incapacity (with such suspension subject to Assembly confirmation before a Commission Member can be removed from office); and the power to make arrangements with the Commonwealth and the States for interchange of electoral staff. The Chief Minister also has the power to enter into joint roll arrangements with the Commonwealth.

The ACT's Electoral Act was modelled on the *Commonwealth Electoral Act 1918*. In particular, the structure of the Commission and the office of the Commissioner and their powers are very similar in the two Acts. Dacey refers to advice from the Australian Government Solicitor in relation to the Australian Electoral Commission that is also applicable to the ACT Electoral Commission, which states:

Whilst technically part of the executive, the Commission is an independent statutory authority which, in view of its prescribed functions in relation to electoral matters, necessarily carries out its duties free from any direction or advice given by the executive government.⁷

Dacey also lists a range of indicators that point to the statutory independence of the Australian Electoral Commission.⁸ That list can be applied to the ACT Electoral Commission as follows:

- The Commission is established as a legal entity separate from the ACT executive and the ACT Legislative Assembly;
- The Commission is not subject to ministerial or government direction in relation to the performance of its functions under the electoral legislation;
- The Commissioner is explicitly entitled to appear in a proceeding in the Court of Disputed Elections in which the validity of an election is being disputed;
- The Commissioner is empowered to seek injunctions restraining breaches or anticipated breaches of the electoral law;

⁷ Dacey (2005), p 5.

⁸ Dacey (2005), p 7.

- The Commissioner has power to investigate compliance with the funding and disclosure laws and other electoral laws;
- The Commission has the right to determine and express its own views on electoral matters without being subject to ministerial or governmental direction or approval;
- Members of the Commission are appointed for fixed terms with limited scope for their removal, with their remuneration determined by the Remuneration Tribunal; and
- The Commissioner has chief executive powers over the Commissioner's staff.

It can be seen that the independent nature of the Commission and the Commissioner under the Electoral Act is relatively well established, at least in relation to the exercise of electoral functions under the Electoral Act.

However, the Commission's independence under the Electoral Act is effectively determined by reading between the lines of the powers given to the Commission and the Commissioner, including those listed above. The Commission suggests that it would be desirable to amend the Electoral Act to explicitly express the Commission's independence. For example, the Tasmanian *Electoral Act 2004* states at section 10 "The Commission is not subject to the direction or control of the Minister in respect of the performance or exercise of its functions or powers."

An equivalent provision in ACT law is section 46 of the *Public Sector Management Act 1994*, which provides "The clerk [of the Legislative Assembly] is not subject to direction by the Executive in the exercise of the clerk's functions."

The Commission suggests that a similar provision should be inserted in the ACT's Electoral Act, with a reference to the separate roles of the Commission and the Commissioner. An explicit statement in legislation along these lines would serve to prevent the Commission's independence from ever being eroded through any failure to appreciate the significance of the Commission's independence.

However, even with the insertion of such a provision in the Electoral Act, the Public Sector Management Act and the *Financial Management Act 1996* could still be interpreted as permitting some executive or departmental control of the Commission and the Commissioner.

The Public Sector Management Act 1994

The Public Sector Management Act defines 'government agency' to mean 3 distinct and mutually exclusive types of agencies: an administrative unit; a territory instrumentality; and a statutory office-holder and the staff required to assist the statutory office-holder. The office of a statutory office-holder and the staff required to assist the statutory office-holder, such as the Electoral Commissioner and his or her staff, is a separate agency from, and not contained within, an administrative unit.⁹

⁹ Legal advice provided by the Australian Capital Territory Government Solicitor's Office, 11 September 1998.

Section 25 of the Public Sector Management Act provides that a statutory office holder has all the powers of a chief executive in relation to the staff employed to assist the office holder, where the Chief Minister makes a notifiable instrument to that effect or where a territory law gives all the powers of a chief executive to the statutory office-holder. Such an instrument has been made in respect of the Electoral Commissioner.

It is of concern that the Electoral Commissioner's chief executive powers are dependent on an executive instrument that could be unmade at any time. It is noteworthy that other equivalent statutory officer holders, such as the Director of Public Prosecutions, the Auditor General and the Clerk of the Legislative Assembly, each have chief executive powers under the Public Sector Management Act specified in relevant legislation. The Commission suggests that the Electoral Act should be amended to make a similar provision to ensure the independence of the Commissioner and the staff employed to assist the Commissioner.

Section 14 of the Public Sector Management Act gives the Chief Minister the power to make administrative arrangements, allocating to a Minister responsibility for 1 or more administrative units and allocating to an administrative unit responsibility for all or any of the enactments and matters for which the relevant Minister is responsible.

Section 29 of the Public Sector Management Act gives the chief executive of an administrative unit the responsibility, under the relevant Minister, for the unit's administration and business. The current administrative arrangements allocate responsibility for the Electoral Act and for electoral matters to the Attorney General and the Department of Justice and Community Safety.

It is the Commission's view that the "responsibility" for the Electoral Act and for electoral matters allocated to the Attorney General and the Department of Justice and Community Safety extends only to those matters for which the Minister is legally responsible. As discussed above, the conduct of the functions given to the Commission and the Commissioner are the responsibility of the Commission and the Commissioner and are not subject to the direction of the Minister. In addition, the office of the Commissioner is not part of the relevant administrative unit. While the Minister and the Minister's department have an oversight role and the Minister has the ability to request advice from the Commission, these roles do not permit the Minister or the Minister's department to direct the Commission or the Commissioner in the course of their functions.

Again, this interpretation of the relevant law involves some reading between the lines. To ensure that the provisions of the Public Sector Management Act cannot be seen as compromising the Commission's or the Commissioner's independence, the Commission suggests that the explicit legislative statement of the Commission's independence should also make it clear that the Public Sector Management Act does not override the independence of the Commission guaranteed in the Electoral Act.

The Financial Management Act 1996

The final area in which the Commission's independence is arguably limited is its budgetary situation under the Financial Management Act. In this case, the Commission's financial position clearly fails the independence test of "ownership and management of a budget independent of day-to-day government control that does not fall within the budget of a government ministry".

Orr, Mercurio and Williams state:

Practical independence of electoral agencies can only be achieved through long-term guarantees of adequate resourcing and full budgetary freedom. Not all states or territories, for instance, commit ample resources to electoral administration.¹⁰

While explicit recognition is given to statutory officer holders and their staff in the Public Sector Management Act, to the extent that these constitute discrete agencies under that Act, the Financial Management Act effectively ignores statutory office holders and their staff, and reads as if the entire ACT Public Service consisted of administrative units and Territory authorities (that is, bodies corporate established by Acts – the ACT Electoral Commission is not a body corporate). Consequently, budgeted funds for statutory officer holders are allocated to administrative units. Responsibility for those funds is allocated to the chief executives of those administrative units.

Consequently statutory officer holders only receive funds through the administrative unit listed in the administrative arrangements as being responsible for the relevant legislation. Under this arrangement, statutory officer holders may only spend funds as a delegate of the relevant administrative unit chief executive. While this arrangement has generally worked satisfactorily in practice in relation to the Electoral Commission, it has the potential to compromise the statutory independence of statutory officer holders, as they are reliant on an external body for funding – a body that is subject to the direction of a Minister.

An issue of note is that the amount of funds allocated in the budget papers for electoral services is not the amount allocated to the Electoral Commission. The amount in the budget papers is allocated to the Department of Justice and Community Safety administrative unit, which at its own discretion retains a portion of those funds to cover administrative overheads and allocates the remaining funds to the Electoral Commission. In effect, the budget for the Electoral Commission is not the electoral services amount voted on by the Legislative Assembly; rather it is an amount decided effectively by the chief executive of the department.

While this has not been an issue in practice, in theory there is nothing to prevent the department from deducting funding from the electoral services budget to fund other portfolio initiatives or to find portfolio savings that are not directly related to electoral services. An issue that may arise in 2010/2011 is related to the funding cuts announced in the 2009/2010 budget, whereby large agencies would have funding reduced by 1%, and small agencies would have funding reduced by 0.5%. As the Commission is funded through the large agency JACS, it may be asked to take a 1% cut or more, even though by any measure the Commission is one of the ACT's smallest agencies.

The other potential threat to the Commission's independence occasioned by these financial arrangements is the possibility that the chief executive of the department may seek to use his or her financial controls and responsibility to effectively direct the Commission or the Commissioner in the course of their

¹⁰ Orr, Mercurio and Williams (2003), p 400.

functions (for example, by vetoing expenditure on particular electoral services). While this has not happened in practice, the legislative regime arguably gives this power to the chief executive of the department.

The existing financial regime also arguably places the chief executive of a department in an invidious position, as the Financial Management Act makes the chief executive "responsible" for monies spent by otherwise independent statutory officer holders.

The Commission recognises that a significant reason why the ACT's small statutory officer holder agencies, such as the Commission, are not treated for budget purposes as discrete agencies is the small size of the agencies. However, the Commission also notes that it is the only Electoral Commission in Australia that is not directly budget-funded. It is noteworthy that the ACT model of Electoral Commission funding and relationship with its portfolio department was explicitly rejected by the Northern Territory when it established its new Electoral Commission in 2004. The Commission considers that small size of an agency should not justify a diminution of statutory independence.

The Commission therefore suggests that relevant legislation should be amended to specifically refer to allocation of funds to the Commission in a manner that respects the Commission's independence. In particular, the Commission suggests that budget allocations should be made directly to the Commission with amounts specified in the budget papers, rather than the present arrangement that divorces the Legislative Assembly from allocating funding directly to the Commission. Similarly, the Commissioner should be allocated direct responsibility for monies spent under the Commission's budget allocation.

The Commission also notes that many of the issues raised above may apply to other statutory officer holders in the ACT, including independent oversight agencies of the type listed in the Latimer House Principles.

Summary

The Commission has made the following suggested changes to legislation in this submission:

- That the Electoral Act be amended to provide that the Commission and the Commissioner are not subject to the direction or control of the Executive in respect of the performance or exercise of their functions or powers other than as explicitly provided in relevant legislation;
- That the Electoral Act be amended to explicitly provide that the Electoral Commissioner has all the powers of a chief executive under the Public Sector Management Act in relation to the staff employed to assist the Commissioner; and
- That relevant legislation be amended to facilitate allocation of funds directly to the office of the Electoral Commissioner and to give direct responsibility to the Commissioner for monies spent by the Commissioner.